

The ERISA Litigation Newsletter

A report to clients and friends of the firm

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Editor's Overview

We begin this month with an analysis of the Supreme Court's recent decision in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, in which the Court held that plan administrators must follow the rules of the plan document when distributing benefits to plan beneficiaries even if that means, in some cases, ignoring a beneficiary's waiver of his or her right to receive such benefits.

We next evaluate two district court decisions that, in different contexts, address the issue of whether plan fiduciaries may have funding obligations that go beyond those required by ERISA's detailed funding requirements. Our sense is that the coupling of the market meltdown in 2008 with the increased funding commitments imposed by the 2006 Pension Protection Act makes this an area of increased litigation risk for fiduciaries.

Finally, be sure to review the section on "Rulings, Filings and Settlements of Interest" for a report on a variety of issues, including "stock-drop" litigation, class certification, standing and statute of limitations.

The Supreme Court Cements the Plan Documents Rule

By Russell L. Hirschhorn & Kara Lincoln

In *Kennedy v. DuPont Savings & Inv. Plan*, 2009 WL 160440 (Jan. 26, 2009), the Supreme Court unanimously held that a plan administrator must pay benefits to a participant's named beneficiary, his ex-wife, as required by the plan documents. In so holding, the Court concluded that his ex-wife's waiver of those benefits, contained in a common law divorce decree, was properly disregarded by the plan administrator since the plan did not recognize such waivers.

William Kennedy was a participant in DuPont's Savings and Investment Plan. The plan provided for his benefits to be paid upon his death to his named beneficiary, or to his estate if no named beneficiary existed or if the named beneficiary had followed the plan's procedure for disclaiming benefits. William's beneficiary-designation form, completed in 1974, named his ex-wife, Liv Kennedy, as his beneficiary. William and Liv were divorced in 1994, pursuant to a decree that divested Liv of her interest in William's pension benefits. William never changed or revoked the form naming Liv as his beneficiary under the plan.

Following William's death in 2001, his daughter requested that the plan administrator pay the pension benefits to William's estate. The administrator instead followed the plan

documents, paying the pension benefits to Liv as the named beneficiary. William's estate filed suit against DuPont and the plan administrator, claiming they violated ERISA by paying Liv because the divorce decree waived Liv's right to the benefits. The district court entered summary judgment for the estate, concluding that the plan administrator should have recognized Liv's waiver in the divorce decree because it was "explicit, voluntary, and made in good faith." The Fifth Circuit reversed, holding that the waiver could not be enforced because it violated ERISA's anti-alienation provision, which provides that a plan must prohibit the assignment or alienation of benefits. The Fifth Circuit also concluded that the waiver did not fall within an exception to that rule because it was not a qualified domestic relations order ("QDRO").

The Supreme Court granted *certiorari* to resolve a circuit split on whether a divorced spouse may waive pension plan benefits through a divorce decree that is not a QDRO. On one hand, the Third and Fifth Circuits had held that common-law waivers of benefits (*e.g.*, in a non-QDRO divorce decree) were void because they conflicted with ERISA's anti-alienation provision. The Fourth and Seventh Circuits found no such conflict. After oral argument, the Court recognized that the case also implicated, and ultimately hinged upon, another circuit split over whether a beneficiary's waiver is effective if it is inconsistent with plan documents. The Fourth, Fifth, Seventh, and Eighth Circuits had held such waivers controlled over conflicting plan documents, but the Second and Sixth Circuits had held that the plan documents control in such circumstances.

The Supreme Court held that Liv's waiver was not effective because the plan administrator had a duty to follow the plan documents and the plan documents did not permit Liv to waive her benefits through a common law divorce decree. The Court reasoned that plan administrators must be able to rely on the plan documents to determine the proper beneficiary, without having to decide whether such a waiver would be upheld by the courts. Notwithstanding the foregoing, the Court pointed out that it was expressing no opinion on whether the participant's estate could have enforced the waiver in a subsequent suit against Liv to recover the benefits that were paid to her by the plan.

The Court's decision cements the plan documents rule by requiring plan administrators to pay benefits strictly according to plan documents. Accordingly, plan sponsors should draft their plans with clear rules for waiving one's rights to benefits under the plan.

District Courts Address Statutory and Contractual Grounds for Imposing Fiduciary Duty To Fund Benefit Plans

By Brian Neulander & Robert Rachal

Two district courts were asked to address claims that plan fiduciaries breached their fiduciary duties to properly fund their plans, even though the plaintiffs identified no requirement under ERISA's statutory funding rules that had been breached. In *Cress v. Wilson*, 2008 WL 5397580 (S.D.N.Y. Dec. 29, 2008), plaintiffs claimed that the defendant-fiduciaries breached their fiduciary duty to ensure that Northwest Airlines' defined benefit

plans were properly funded. Northwest filed for bankruptcy prior to the Pension Protection Act's ("PPA's") amendment of ERISA's minimum funding requirements. Accordingly, the court applied ERISA's minimum funding requirements as they existed prior to the PPA's 2006 amendments.

The district court defined the issue on summary judgment as "whether there can be an actionable delinquency in the funding of a pension plan under ERISA if the minimum funding standards imposed by ERISA are met." Following a detailed discussion of ERISA's funding requirements, the court rejected plaintiffs' argument that ERISA required a fiduciary to seek funding of a plan above the minimum funding standards imposed by ERISA §§ 302-306, 29 U.S.C. §§ 1082-1086. The court held this was true even if the plan had an unfunded accrued liability – in this case, the annual actuarial valuations, also performed by Towers Perrin for Northwest's financial statements, showed an unfunded accrued liability of more than \$3 billion. The court reasoned that imposing duties to fund beyond the specific ones set forth in the minimum funding rules would create an unpredictable system, increase litigation expenses, and generally discourage employers from offering employee benefit plans.

In *Frulla v. CRA Holdings Inc.*, 2009 WL 47326 (D. Conn. Jan. 7, 2009), the district court addressed whether a fiduciary could be required to meet contractual funding obligations, even if those obligations were not imposed by ERISA. In 1993, the predecessor company had entered into an agreed judgment obligating the company to provide lifetime health care benefits to retirees. In a later transaction, the company's assets were sold, and a fund was set aside to pay for these retiree health benefits. It later became clear that the amount set aside was insufficient to fully fund these retiree healthcare benefits. The court held that plaintiffs stated a claim for breach of fiduciary duty. In so holding, the court reasoned that the agreed judgment mandated the funding of specified benefits, and concluded that the defendant fiduciaries may have been required to take actions to ensure sufficient funds were set aside to pay those benefits when the company's assets were sold off. The court reasoned that a fiduciary with knowledge of a risk to the fund may be liable for failing to investigate the means of protecting the fund from that risk.

* * * *

Cress confirms what ought to be a noncontroversial rule: that in determining whether a plan is being properly funded, a fiduciary can rely on a plan's compliance with ERISA's detailed funding requirements. Fiduciaries are still under pressure, however, as the PPA has toughened these funding requirements (and toughened the benefit limitations imposed when plans fall below certain funding levels), and the severe market downturn of 2008 has forced many plans into an underfunded status. Likewise, *Frulla* shows that fiduciaries will have to monitor any funding obligations imposed through contractual commitments.

Rulings, Filings and Settlements of Interest

- In *Bunch v. W.R. Grace & Co.*, 2009 WL 211054 (1st Cir. Jan. 29, 2009), the First Circuit affirmed summary judgment in favor of W.R. Grace and State Street Bank & Co., concluding that neither had breached its fiduciary duty in connection with State

Street's decision, as the delegate trustee, to divest the Grace plan of company stock. In so holding, the court reasoned that State Street, with the assistance of experts, thoroughly studied Grace's corporate health and its conclusion that divestment of stock was the only action consistent with ERISA's prudent fiduciary standard. In addition, the court rejected plaintiffs' attempt to use *Moench's* rebuttable presumption of prudence as a sword against the prudent fiduciary. In other words, the court rejected plaintiffs' argument that State Street's decision to divest the plan of company stock was wrong because there is a presumption of prudence in investing in company stock.

- In *Romberio v. Unum Provident*, 2009 WL 87510 (6th Cir. Jan. 12, 2009), in a 2-1 unpublished decision, the Sixth Circuit decertified a class challenging certain of Unum's alleged claims processing practices for long-term disability benefits provided under ERISA plans. Plaintiffs attempted to bring their class claims as breach of fiduciary duty claims under ERISA § 502(a)(3) and sought re-review of benefit claims of anyone whose benefits had been denied or terminated and who had been subjected to the challenged claims processing practice. The majority of the court reasoned, however, that to show a breach of fiduciary duty the plaintiffs would have to show that the benefit was wrongfully denied or terminated, which would depend on the particular facts and circumstances of each participant's benefit claim. The dissent viewed any class-wide proof of the challenged practice as establishing liability, regardless of the merits of the underlying claim.
- On January 16, 2009, Merrill Lynch & Co. reached a \$550 million settlement with its employees and investors in connection with losses caused by the company's investments in subprime mortgage-backed assets. See *In re Merrill Lynch & Co. Securities, Derivative & ERISA Litig.*, S.D.N.Y., No. 07cv9633. According to a filing with the court, \$75 million of that amount is directed towards settlement of ERISA claims brought on behalf of Merrill Lynch employees who invested in or held Merrill Lynch stock in certain retirement plans during the period Sept. 30, 2006 through Dec. 31, 2008.
- In *Bilello v. JP Morgan Chase Retirement Plan*, 2009 WL 30286 (S.D.N.Y. Jan. 6 2009), plaintiff challenged the conversion of a defined benefit plan to a cash balance pension formula. After bringing suit, plaintiff received a lump sum payout of his pension benefits. Defendants moved to dismiss, claiming plaintiff was no longer a plan participant because of this payout, and thus no longer had standing to sue under ERISA. The court observed that the dispositive issue was whether the plaintiff was seeking benefits, which would grant standing to sue, or damages, which would not. After extensively analyzing the law on the issue, the court held plaintiff's claim was properly characterized as one for benefits because, if plaintiff prevailed, he may be entitled to a recalculation of his benefits under the prior pension formula.

- In *Pressley v. Tupperware Long Term Disability Plan*, 2009 WL 131132 (4th Cir. Jan. 21, 2009), the Fourth Circuit concluded that a plan participant's claim for statutory penalties under ERISA § 502(c), 29 U.S.C. § 1132(c), was subject to a three-year statute of limitations. In so holding, the court rejected the district court's reliance on a prior Fourth Circuit unpublished decision that had applied to such claims South Carolina's one-year statute of limitations, Section 15-3-570, for "an action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it." Instead, the court concluded that the more analogous statute was Section 15-3-540, which provides a three-year statute of limitations for "an action upon a statute for a penalty or forfeiture when the action is given to the *party aggrieved* or to such party and the state." The Fourth Circuit concluded that Section 15-3-570 was more general than Section 15-3-540 and that it should apply the more specific section 15-3-540 so as not to contravene the "basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision."

Employee Benefits Litigation

Proskauer Rose's Employee Benefits Litigation Group is a significant component of the Firm's renowned Labor and Employment Law Department, which has nearly 175 attorneys.

The Employee Benefits Litigation Group is led by Howard Shapiro and Myron Rumeld. The Group defends complex and class action employee benefits litigation.

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